(5)

No. 86-381

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

JOHN K. VAN DE KAMP
Attorney General of
the State of California
STEVE WHITE
Chief Assistant Attorney
General - Criminal Division
J. ROBERT JIBSON*
Supervising Deputy
Attorney General

1515 K Street, Suite 511
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-6981

*Counsel of Record

11 pp

QUESTION PRESENTED

Consistent with Michigan v. Doran, 439 U.S. 282 (1978), may an asylum state court block extradition on the ground that the fugitive has not been "charged with a crime" because the court concludes, based on extrinsic evidence, that the fugitive is innocent?

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

STATUTES, CODES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

No. 86-381

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the California Supreme Court (reported at 41 Cal.3d 758, 716 P.2d 991) appears in Appendix A to the Petition for Certiorari (Pet. App. A). The opinion of the California Court of Appeal, Fourth Appellate District, Second

Division, (unreported decision in case No. E001358) appears in Appendix B to the Petition for Certiorari (Pet. App. B). The oral ruling of respondent San Bernardino County Superior Court (contained in a partial transcript of the proceedings of August 24, 1984, in case No. SCV-224030) appears in Appendix C to the Petition for Certiorari (Pet. App. C), and in the Joint Appendix (Jt. App., pp. 47-52).

JURISDICTION

The decision of the California Supreme Court was filed on May 1, 1986. The People's petition for rehearing was denied on June 5, 1986 (see Pet. App. D). This Court has jurisdiction under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Clause 2, of the United States Constitution, the Extradition Clause, provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction over the Crime."

Title 18 U.S.C. Section 3182, the Federal Extradition Act, provides:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person had fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as

authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, district or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

California Penal Code sections 1548.2, 1550.1 and 1553.2, part of the Uniform Criminal Extradition Act, appear in Appendix E to the Petition for Certiorari (Pet. App. E).

* * * *

STATEMENT OF THE CASE

A. The Underlying Offense and Louisiana's Extradition Request

On the morning of March 9, 1984, Richard Smolin and his father Gerard (real parties in interest in this case) took Richard's two young children from a bus stop in St. Tammany Parish, Louisiana, and brought them to California. (Pet. App. A, p. 4; Pet. App. B, p. 4.) At the time, the children were living in the custody of their mother (Richard's former wife), Judy Pope and their step-father in Louisiana.[1] Three days later, the prosecutor in St. Tammany Parish charged the Smolins with two counts of

---

1. Richard and Judy were divorced in San Bernardino County, California, in 1978, at which time Judy was awarded custody of the children, (Pet. App. A, p. 2; Pet. App. B, p. 3.)

parental kidnapping[2/] and warrants for their arrest were issued. (Pet. App. A, pp. 4-5.)

On June 14, 1984, Governor Edwards of Louisiana executed requisition demands upon Governor Deukmejian of California for the arrest of the Smolins and their delivery to agents of Louisiana for return to that state. In accordance with the Uniform Criminal Extradition Act (UCEA), the demand was supported by certified copies of the bill of information and arrest warrants, a 1981 Texas court decree giving full faith and credit to a 1978 California court order awarding

---

2. The bill of information charged a violation of La.Rev.Stat. § 14:45, subdivision (4) of which describes the crime as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state." (Pet. App. A, pp. 4-5.)

Judy custody of the children, and a sworn affidavit by Judy Pope which stated:

"On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnapped Jennifer Smolin, aged 10, and James C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana. The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part thereof. The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Dridle Street, Slidell, Louisiana.

Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody." (Pet. App. A, pp. 7-8.)[3]

On August 6, 1984, the California governor notified the Smolins that he intended to issue warrants for their extradition, but would withhold issuance until August 23, 1984. (Pet. App. B, p. 6.)

B. Extradition Proceedings in the California Superior Court

Prior to their arrest on the Governor's warrants, the Smolins sought habeas corpus relief in the Superior Court of San Bernardino County

---

3. The extradition papers also contained a Louisiana court order dated March 9, 1984, granting custody of the children to Judy and prohibiting their removal from the jurisdiction (St. Tammany Parish) pending a contested hearing on the custody matter. (Pet. App. A, pp. 7-8.)

(respondent in this case). The Smolins argued that they were not "substantially charged with a crime" as required under the UCEA because Richard actually had legal custody of the children when he took them from the Louisiana bus stop; therefore he and Gerard could not be guilty of a crime under Louisiana law. (Pet. App. A, p. 9.) A hearing on the Smolins' application was held on August 24, 1984. Over the People's objections, the superior court judge took judicial notice of the "family law file" involving the 1978 dissolution of the marriage of Richard Smolin and Judy Pope.[4/] (See Joint Appendix, pp. 47, 52.) Based on material in that file,

---

4. The habeas corpus proceedings were held before the same judge who presided over the earlier family law matter.

specifically a modified order issued three years after the dissolution which awarded custody of the children to Richard, the superior court found that Judy Pope's affidavit in support of the extradition demand contained falsehoods and granted habeas corpus relief. (Jt. App., pp. 47-52.) In so doing, the court quoted at length directly from the record of the family law case, and then concluded "that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an [sic] interest of the State of Louisiana." (Jt. App., p. 52; Pet. App. C.)

C. The Family Law Case Background[5/]

Richard and Judy's California marriage was dissolved in April of 1978 by the Superior Court of San Bernardino County. Judy was awarded custody of the two children, Jennifer, then age 4, and Jamie, age 3. (Jt. App., p. 61[6/]) Judy remarried late in 1979 and in

---

5. This information is provided for background only. Despite repeated, strenuous objections by the People, the superior court took judicial notice of the "family law file," which contained the facts surrounding the custody dispute between Richard Smolin and Judy Pope. Whether such judicial notice was proper in the context of a challenge to extradition is a fundamental issue in this case; the People maintain that these facts are irrelevant to the only issues cognizable in such a challenge.

6. The Joint Appendix, pages 60-98, contains a copy of the unreported opinion of the California Court of Appeal, Fourth District, Division Two, filed February 25, 1986, in case No. E001146. This case was the appeal by Judy Pope of the superior court's decision confirming its prior order giving Richard Smolin sole custody of the children.

January of 1980 moved with her present husband, Mr. Pope, and the children to Texas, where Mr. Pope had taken a job. Richard apparently did not learn of this move for several months. (Jt. App., p. 62.)

In September of 1980, Judy commenced an action in Texas to obtain a full faith and credit decree recognizing her 1978 California custody order. Richard was served but did not appear in that action. A month later, Richard commenced a proceeding in respondent superior court to modify the original custody order; he did not advise the court of the pending proceedings in Texas. Judy was served but did not appear in these California proceedings. (Jt. App., p.63; Pet. App. A, p. 3.)

On October 27, 1980, respondent court modified the original custody order and awarded Richard joint custody. Judy was served with this modified order, but her attorney felt it was unenforceable due to lack of jurisdiction in the California court. (Jt. App., pp. 63-64.)

On February 13, 1981, the Texas court issued its decree extending full faith and credit to the original California order giving Judy custody. Two weeks later, Richard obtained a second modification from respondent court, this time awarding him sole custody. (Jt. App., pp. 64-65.)

In March of 1981, Judy's husband was transferred and the family moved to Louisiana. According to Richard, he did not learn of the children's whereabouts until October of

1982; he spoke to them over the telephone in January of 1983 and sent them gifts the following Christmas. (Jt. App., pp. 65-66.)

In February of 1984, Richard was served in an action commenced by Judy and Mr. Pope in Louisiana for the adoption of the children by Mr. Pope. Richard did not appear in that action; instead, on March 9, 1984, a week before the Louisiana proceedings were to be heard, Richard and his father, Gerard, abducted the children from a bus stop in Slidell, Louisiana. At no time did Richard seek to enforce his California decrees in the courts of either Texas or Louisiana. (Jt. App., pp. 66-69.)

In April of 1984, Judy appeared in respondent court and sought to set aside Richard's sole custody

order. A month later, the court reaffirmed its order and Judy subsequently appealed. In February of 1986, the appellate court reversed on the basis that respondent court abused its discretion in reaffirming the 1981 order giving sole custody to Richard. (See footnote 6, supra; Jt. App., pp. 60-98.)

D. Extradition Proceedings In California Appellate Courts

Meanwhile, the People sought review of respondent court's order barring extradition by way of a writ of mandate in the Court of Appeal, Fourth Appellate District.[7/] That court reversed the order of respondent

---

7. State law permits such extraordinary relief in extradition matters because it typically produces a much speedier resolution than direct appeal. (See People v. Superior Court (Lopez) 130 Cal.App.3d 776, 779-780, 182 Cal.Rptr. 132, 134 (1982).)

superior court, holding that the lower court improperly took judicial notice of the California decree giving Richard Smolin custody since such extrinsic evidence simply offered an affirmative defense which could only be raised in the Louisiana court. (See Pet. App. B.)

Real parties (the Smolins) sought review of the court of appeal's ruling in the California Supreme Court, which granted hearing in May of 1985. A year later, on May 1, 1986, the state supreme court issued its opinion, reversing the court of appeal and holding that respondent superior court was correct in taking judicial notice of the extrinsic evidence that Richard had been awarded custody by a California court. (See Pet. App. A.) The state supreme court denied the

People's petition for rehearing on June 5, 1986. (See Pet. App. D.)

The California Supreme Court acknowledged the limited scope of the inquiry permitted the asylum state's courts in extradition proceedings (Pet. App. A, pp. 13-14, 18), but nevertheless held that judicial notice of the Smolin-Pope "family law file" was permissible because it contained "historic facts readily verifiable," thus rendering its ruling in "complete harmony" with this Court's holding in Michigan v. Doran , 439 U.S. 282, 289, (1978). Further, the state supreme court asserted that the important governmental interests at stake in the prompt execution of extradition requests are "not jeopardized" by its holding. It reasoned that "[s]ince Louisiana would be compelled under the

terms of the PKPA [28 U.S.C.A. § 1738A(a)] to take judicial notice of the California order, there is no justification for withholding recognition by a California court." (Pet. App. A, p. 35.) The court thus concluded that "the efficiency of the extradition process is enhanced rather than hampered by a resolution of the issue by a California court." (Pet. App. A., p. 36.)

* * * *

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that the Extradition Clause was intended "to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed." Michigan v. Doran, 439 U.S. 282, 287; Biddinger v. Commissioner of Police, 245 U.S. 128, 132-133 (1917); Appleyard v. Massachusetts, 203 U.S. 222, 227 (1906). It was likewise intended to preserve harmony and comity among the states by "preclud[ing] any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkaniz[ing]' the administration of criminal justice among the several states." Michigan v. Doran, supra, at p. 287.

In furtherance of these purposes, the role of the courts in an asylum state is extremely limited. They are strictly precluded from inquiring into the question of the guilt of the accused and may not consider any affirmative defenses to the crime charged. Michigan v. Doran, supra, at p. 288-289; Biddinger v. Commissioner of Police, supra, at p. 135. While a court may entertain the issue of whether the person is "charged" with a crime, this question is one of law, to be determined upon the face of the extradition documents. Roberts v. Reilly, 116 U.S. 80, 95 (1885).

The actions of the courts of California in this case reflect a total disregard for these fundamental principles of extradition law and

result in the frustration of the purposes of the Extradition Clause. Real parties as much as acknowledged that the requirements for extradition had been met by the State of Louisiana -- and there was no argument on the issues of identity and "fugivity." (Jt. App., pp. 12, 26-27.) Yet respondent superior court, and later the California Supreme Court, accepted real parties' invitation to look beyond the face of the extradition papers to determine whether they were "charged" with a crime. Thus, the state courts judicially noticed a decree issued three years prior to the abduction -- a decree issued by respondent court -- which awarded custody to real party Richard Smolin.

Having determined that because of this decree Mr. Smolin could

not be found guilty in Louisiana, the California courts concluded he is not "charged" with an offense there. The fallacy of this reasoning is self-evident. Such an approach will inevitably lead to "trials" of the charges in asylum states -- an exercise at odds with the principles and precedent governing extradition law.

By taking judicial notice of evidence extrinsic to the extradition documents, albeit evidence within its own files, the California court crossed the line into a domain exclusively reserved to the State of Louisiana: the determination of guilt or innocence. In upholding the action of respondent superior court, the California Supreme Court has misconstrued the clear holdings of this Court and distorted the concepts of

interstate comity and efficiency in bringing fugitives to justice. In essence, that court has said, because it appears to us that Mr. Smolin could not be found guilty in Louisiana, he is not "substantially charged" with a crime.

The danger of this unprecedented holding is clear; and it has been recognized by at least 20 other states and territories, including Louisiana, who joined as amici curiae in support of California's petition for writ of certiorari. This Court should reverse the California court's decision and once again reaffirm existing precedent which establishes that guilt may only be determined in the demanding state, and whether a person is charged with a crime is a question of law upon

which evidence outside the extradition papers may not be considered.

* * * *

ARGUMENT

I. RESPONDENT COURT AND THE CALIFORNIA SUPREME COURT HAVE EXCEEDED THEIR JURISDICTION BY CONSIDERING EXTRINSIC EVIDENCE ON THE QUESTION OF WHETHER REAL PARTIES ARE "SUBSTANTIALLY CHARGED" WITH A CRIME

Article IV, section 2, clause 2, of the United States Constitution provides:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This clause has been implemented by Congress in Title 18, U.S.C. section 3182, and it has been supplemented by the states through the adoption of the Uniform Criminal Extradition Act. In California, the pertinent provisions are Penal Code sections 1548.2, 1550.1 and 1553.2.

Together, these provisions create a mandatory duty upon the asylum state to deliver to a demanding state a person charged with a crime there. Extradition was intended to be a summary executive proceeding in which the judiciary plays an extremely limited role. (Michigan v. Doran, 439 U.S. 282, 288, (1978).)

In Michigan v. Doran, this Court defined the limits of the inquiry which an asylum state court is permitted to make:

> "[T]he courts of an asylum state are bound by Art. IV, § 3182, and where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met . . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for

extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." (439 U.S. at pp. 288-289; see also Pacileo v. Walker, 449 U.S. 86, 87, (1980).)

Real parties have admitted they are the persons who took the children and whose extradition is sought by Louisiana authorities, and there is no question that the extradition documents on their face are in order. (Pet. App. A, p. 4, dissent.) Real parties argued, and the state supreme court held, that they are not "substantially charged"[8/] with a

---

8. This term derives from earlier decisions of this Court (Munsey v. Clough, 196 U.S. 364, 373 (1905); Pearce v. Texas, 155 U.S. 311, 313 (1894); and is used in the UCEA (§ 3). (Cal.Pen. Code, § 1548.2.) The adverb "substantially" does not add anything to the constitutional requirement that the person be charged. It simply means that the substance of a criminal charge must be alleged against the person. (See Michigan v. Doran, supra, 439 U.S. at p. 285; People v. Noble, 169 NYS.2d 181, 184, (1957); Procter v. Skinner

crime in Louisiana. However, the state court confused the question of whether respondents are substantially charged with a crime with the question of whether they are innocent.

Whether a person is substantially charged with a crime against the laws of the demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus." (Roberts v. Reilly, 116 U.S. 80, 95, (1885) emphasis added.) The courts which have considered this question agree that the inquiry on this issue may not go beyond the face of the

---

659 P.2d 779, 782, (Ida. 1982) ; People v. Sheriff of Westchester County 166 NE 795, 796 (NY 1929); see generally, Matter of Strauss 197 U.S. 324, 331, (1905).)

extradition documents.[9] No cases have been found which permit the consideration of evidence extrinsic to the documents on the issue of whether the fugitive is substantially charged; certainly the California Supreme Court found none to support its unprecedented holding.

In Biddinger v. Commissioner of Police, 245 U.S. 128 (1917), this Court addressed the question of what extrinsic evidence is admissible in an

---

9. See, e.g., United States v. Flood, 374 F.2d 554, 556, (2d Cir. 1967); Moncrief v. Anderson, 342 F.2d 902, 904, (DC Cir. 1964); Kerr v. Watson, 649 P.2d 1234, 1238, (Ore. 1982); Fisco v. Clark, 414 P.2d 331, 333 Ex parte Paulson (Ore. 1942) 124 P.2d 297, 300, (Ore. 1966); Ex parte Harrison, 568 SW2d 339, 342, (Tex. 1978); Eroh v. Sheriff, 272 NW2d 720, 722, (Mich. App. 1978); Black v. Miller, 59 F.2d 687, 690, (9th Cir. 1932). Also, for a case very similar to the case at bench, see People ex. rel. Leach v. Baldwin, 174 NE 51, (Ill. 1930).

extradition habeas corpus proceeding. There it was stated "that when the extradition papers required by the statute are in proper form the only evidence sanctioned by this Court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed . . . ." (245 U.S. at p. 135.) Fugitivity being a question of fact, extrinsic evidence is permitted - not so as to the question of law whether the fugitive is substantially charged.

No principle of extradition law is more settled than that the asylum state may not inquire into the guilt or innocence of the accused or consider any affirmative defense to the crime. (UCEA § 20 (Calif. Pen. Code,

§ 1553.2); Michigan v. Doran, supra, Biddinger v. Commissioner of Police, supra; Drew v. Thaw, 235 U.S. 432, 439-440 (1914); Strassheim v. Daily, 221 U.S. 280, 283, 286 (1911).) Yet, when an asylum state court admits extrinsic evidence, for example to attack the veracity of the complaining witness as in this case, the court is doing nothing more nor less than permitting the introduction of an affirmative defense which should only be permitted in the demanding state, where the charges are pending.10/ This evidence

---

10. The superior court below based its order granting habeas corpus relief on a finding that the averments of the complaining witness in her sworn affidavit were false. (This finding by the court was not surprising - it simply reflected the same judge's earlier conclusions in the family law matter.) However, in deciding the question of whether there is a substantial charge, the asylum state court may not inquire into the truth of the allegations. (Pierce v. Creecy,

does not establish that the accused has not been charged, it only suggests that he might be innocent. Even if that be the case, it is a question only the demanding state's courts have jurisdiction to determine. (Drew v. Thaw, supra, 235 U.S. p. 439.)

In Drew v. Thaw the fugitive, accused of escape from a mental institution, contended in his habeas corpus challenge to extradition that if he was insane at the time he contrived his escape he could not be guilty,

---

210 U.S. 387, 403, (1908); see also People v. Schneckloth, 660 P.2d 1293, 1295, (Colo. 1983); Stack v. State ex rel. Morgan, 381 So.2d 366, (Fla. App. 1980).) "An attack on credibility is, in effect, an attack on the demanding state's finding of probable cause. Such an attack is possible only in the courts of the demanding state. [Citations.] Once a court in the asylum state has satisfied itself with the facial validity of the documents, no further inquiry is appropriate on this issue. [Citations.]" (People v. Schneckloth, supra, at p. 1295.)

while if he was not insane he was entitled to be discharged from the institution anyway. He claimed the facts in the record required a finding that he was insane. This Court disposed of the contention, declaring:

> "But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried . . . . When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State and the reasonable possibility that it might be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." (235 U.S.

at pp. 439-440, emphasis added.)

Had the reasoning of the California courts prevailed in Drew v. Thaw, the courts of New Hampshire could simply have taken "judicial notice" of Thaw's New York mental commitment (certainly an "historic fact readily verifiable"), found that as an insane person he could not have committed the crime charged there, and concluded that he was therefore not "substantially charged." Yet this argument was made, at least implicitly, by Thaw -- and flatly rejected by this Court. There is no reason to believe a different decision would have resulted had a document committing Thaw to the insane asylum been produced. Simply put, this Court eschewed any inquiry beyond the face of the papers on the question of the charge of a crime; no speculation

as to the ultimate result of a trial is permissible.

This principle was echoed a few years later in South Carolina v. Bailey, supra, 289 U.S. 412, where the accused raised the question of fugitivity on habeas corpus in the asylum state: "It was wholly beyond the province of the judge [on habeas corpus] to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding State." (289 U.S. at p. 420.)

The underlying reasoning of the California Supreme Court herein is that because real parties should be found not guilty in Louisiana (in light of Richard's California custody order), they are not charged with a crime. This sophistry is in absolute

contradiction to the settled principles announced by this Court in Drew v. Thaw, South Carolina v. Bailey, Roberts v. Reilly and other cases.

It is significant that absolutely no case authority was cited by the California courts, or offered by real parties, in favor of the proposition that extrinsic evidence is admissible on the question of whether a fugitive is substantially charged. The two cases apparently relied upon most heavily by the state supreme court do not support its holding. In People ex rel. Lewis v. Com'r of Correction, 417 NYS.2d 377 (1979),it was held that an asylum state court may inquire whether the act alleged in the extradition papers constitutes a crime according to the law of the demanding state. That a court may judicially notice the law of

Richard Smolin. Indeed, petitioner certainly recognizes California's interest in protecting and upholding its custody orders. The point of the foregoing discussion is simply that the matter of Richard's defense to the Louisiana charge is subject to dispute. As in all cases, there are two sides to this litigation. Louisiana should not have to appear in the courts of California to refute a defense to its charges raised in the context of an extradition hearing. As stated so succinctly by Justice Homes: "The case is not to be tried on habeas corpus." Strassheim v. Daily, 221 U.S. 280, 283, 286 (1911).

Despite the judicial creativity demonstrated by the California Supreme Court in its claim of consistency with Michigan v. Doran

act charged was not in the abstract a crime under California law at that time, since a partner could not be guilty of theft from his own partnership. Again, contrary to the California Supreme Court's attempt to liken that case to the present one, Varona did not involve consideration of evidence outside the extradition papers themselves. Rather, it was limited to the face of the extradition documents.

The present case itself provides a clear illustration of why extrinsic evidence should not be considered on this issue. Real parties have repeatedly averred, and the courts of California have apparently agreed, that there is simply no question that Richard Smolin's California custody order is an air-tight defense to the criminal charge because under federal

law and the Uniform Child Custody Jurisdiction Act (UCCJA) Louisiana must recognize the decree. However, there is a basis upon which that decree could be challenged.

There is no doubt that concurrent jurisdiction can exist in more than one state at a given time to render orders regarding the custody of children. This was recognized by the state appellate court in the custody case regarding Richard Smolin and Judy Pope: while upholding the modified custody order in Richard's favor, the court acknowledged that Texas had acquired "home state" jurisdiction because Judy and the children had lived there for nearly a year. Moreover, Judy had invoked that jurisdiction by seeking full faith and credit recognition by the Texas courts

of the original California decree. (Jt. App., p. 74.) Both the UCCJA[11] and the federal Parental Kidnapping Prevention Act (PKPA)[12] address the concurrent jurisdiction situation; indeed, a principal purpose underlying these statutes is to determine, as between two states with concurrent jurisdiction, which one should exercise its jurisdiction. Both acts preclude the exercise of jurisdiction by a court if there are already custody proceedings pending in a court of another state which also has jurisdiction.[13]

---

11. See U.L.A., Master Edition, Volume 9.

12. 28 U.S.C.A. § 1738A.

13. Section 6(a) of the UCCJA provides:

> (1) A court of this State shall not exercise its jurisdiction under this Act

The procedure outlined in the UCCJA contemplates that the parties will inform the court whether proceedings are pending in another

---

> if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(See Cal. Civ. Code § 5155(1).)

28 U.S.C.A. section 1738A(g) states:

> "A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

state, and then requires the court to communicate with the court in the other state to determine which should exercise jurisdiction.[14]/

---

14. Section 6(b) and (c) of the UCCJA provides:

> "(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.
>
> "(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and

When real party

Richard Smolin sought his first modification, in October of 1980, the Texas proceedings were already pending -- and Richard had been notified of those proceedings. Texas was asked to exercise "home state" jurisdiction and judicially recognize the original

---

> communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this State has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

(See Cal.Civ. Code, § 5155(2) and (3).)

California decree. The California court, apparently not informed of the Texas proceedings, failed to comply with the UCCJA's communication requirement in order to prevent conflicting custody orders. Had Richard Smolin so informed the California court, the conflicting orders might have been avoided.15/

Petitioner is not now challenging the California custody order relied upon by real party Richard Smolin. Indeed, petitioner certainly recognizes California's interest in protecting and upholding its custody orders. The point of the foregoing discussion is simply that the

---

15. Likewise, had Judy Pope advised the Texas court of the California modification, which took place prior to the issuance of the Texas decree, the conflict might not have occurred.

matter of Richard's defense to the Louisiana charge is subject to dispute. As in all cases, there are two sides to this litigation. Louisiana should not have to appear in the courts of California to refute a defense to its charges raised in the context of an extradition hearing. As stated so succinctly by Justice Holmes: "The case is not to be tried on habeas corpus." Strassheim v. Daily, 221 U.S. 280, 283, 286 (1911).

Despite the judicial creativity demonstrated by the California Supreme Court in its claim of consistency with Michigan v. Doran and other applicable precedents, the nub of its decision cannot be hidden. Perhaps it is best revealed by the court's astounding observation that "the efficiency of the extradition

process is enhanced rather than hampered by a resolution of the issue [of the effect of Richard's custody order on the Louisiana charges] by a California court." (People v. Superior Court (Smolin) 41 Cal.3d 758, 772 (1986).)[16/] While in many cases it may appear more "efficient" simply to determine a fugitive's guilt or innocence in the asylum state, such a

---

16. The California Supreme Court cites Ierardi v. Gunter, 528 F.2d 929, 93 (1st Cir. 1976), at this point. In that case the court held that if the extradition papers did not show that a judicial finding of probable cause has been made in the demanding State, a court in the asylum State must do so as a prerequisite to interstate rendition. (Citing Gerstein v. Pugh, 420 U.S. 103 (1975).) Ierardi provides absolutely no support for the California court's decision in the present case. First, Ierardi was decided before Michigan v. Doran. Second, and more importantly, in the present case there was a judicial finding of probable cause made in Louisiana which was not reviewable in California. (Michigan v. Doran, supra, 439 U.S. at p. 290.)

practice not only ignores the mandate of the Constitution and pronouncements of this Court, but affronts the judicial system of the demanding state.

Real parties' own argument also plainly exposes their true position: "As the California Supreme Court noted, federal law requires that, sooner or later, the 1981 California decree be judicially noticed in resolving the issue of the Smolins' culpability on the kidnapping charge." (Opp. to Pet. for Cert, p. 22.) Obviously, real parties would prefer the resolution of their "culpability" take place "sooner," while they are still in California. But the law is clearly otherwise.

Just as real parties sought to avoid its family law court, they are now attempting to avoid Louisiana's

criminal court. Assuming real parties are correct that federal law requires all states, including Louisiana, to recognize Richard's California decree, it may well be asked why they have so vigorously and consistently refused to give any court outside California the opportunity to do so. They successfully transferred the forum for the custody dispute to California by abducting and removing the children from Louisiana, contrary to the spirit and purposes underlying both the PKPA and the UCCJA. Their attempt to litigate Louisiana's criminal charge in California should not meet with similar success.

> "The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. [Citations.] The purpose of the Clause was to

preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states. It articulated, in mandatory language the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV . . . .

"The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." (Michigan v. Doran, supra, 439 U.S. at pp. 287-288, emphasis added.)

Here, the California courts went beyond a "preliminary inquiry;" they made a determination on the ultimate issue of real parties' guilt or innocence. The state supreme court's futile attempt to disguise this determination as a finding that real parties are not charged is readily transparent. This Court pointed out in

Pierce v. Creecy, supra, 210 U.S. 387, 401:

> ". . . [I]t will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of a crime for reasons that are apt only to destroy its validity as a criminal pleading."

Similarly, the California Supreme Court paid lip service to the rule that there can be no inquiry into the issue of guilt or innocence in the asylum state, then held the fugitives are not substantially charged "for reasons that are apt" only to show their innocence.

* * * *

II. THERE SHOULD BE NO EXCEPTIONS TO THE RULE PROHIBITING THE CONSIDERATION OF EXTRINSIC EVIDENCE ON THE QUESTION OF WHETHER A PERSON IS SUBSTANTIALLY CHARGED

It has been suggested, by the California Supreme Court and by real parties in interest, that judicial notice of extrinsic evidence on the substantial charge issue is permissible under certain circumstances, for instance where the information is "readily verifiable." Thus, the state court proclaimed that its holding is in "complete harmony" with Michigan v. Doran because the custody order "is at least as verifiable as the other matters referred to in the Supreme Court's opinion, such as whether the petitioner is a fugitive from justice." (41 Cal.3d at p. 770.)

The response to this gross

misconstruction was perhaps best stated by Justice Lucas in dissent:

> "The majority has put the cart before the horse. What the Supreme Court in Michigan v. Doran held was that there are only four matters that can be considered in habeas corpus extradition proceedings. Although the high court added that these four matters "are historic facts readily verifiable" (438 U.S. at p. 289), it did not hold that a court may consider any other matters (such as asylum state custody rulings or defenses to the crime charged) which may also be considered 'historic facts readily verifiable.' The four areas of inquiry described by the court were not illustrative. They were meant to define and restrict the actual boundaries of permissible inquiry. Thus, the trial court clearly exceeded its jurisdiction in considering the California custody ruling because that was not a matter fully under one of Michigan v. Doran's four categories." (41 Cal.3d at p. 775.)

Any attempt to carve out a narrow exception where the evidence is

readily available, even within the asylum state court's own files, would do nothing but create mischief and spawn challenges to extraditions never before contemplated. Nothing in the California court's opinion indicates its rationale would be limited to the rather unique facts of this case.

A number of instances can be cited where, as here, a legal document could be presented to show "no substantial charge." For example, an accused car thief could present a certificate of ownership to the allegedly stolen vehicle; an accused rapist could produce a certificate proving the alleged victim was his wife (in those states with no spousal rape laws); an accused bigamist could produce a divorce decree; one accused of nearly any crime could produce a

court order adjudging him insane or mentally incompetent (see Drew v. Thaw, supra, 235 U.S. at 439-440). An accused parental kidnapper who produces a custody decree is no different than these, no matter how readily accessible the extrinsic evidence is. What they have all shown is the existence of a defense, not the absence of a charge.

By refusing to accept real parties' invitation to make an exception in this case, even assuming the evidence from respondent court's family law file provides an absolute defense, this Court will reaffirm, in "bright line" fashion, the rules that whether an accused is substantially charged must be determined only on the face of the papers, and that affirmative defenses, no matter how

apparent, may be raised only in the demanding state.

Nor is an exception required to prevent the perpetration of fraud in the charging of crimes. Respondent superior court and real parties in interest have accused Judy Pope of perjury in her sworn affidavit in support of the charges. But contrary to real parties' claim, she did not swear that no decree in Richard's favor existed. (Opp. to Pet. for Cert., p. 25.) She declared that real parties "were without authority to remove children from affiant's custody," which she no doubt believed, since her attorney was of the opinion the modified California custody order was unenforceable for lack of jurisdiction. (Jt. App., pp. 63-64.)

Extradition is an executive function in which the courts play an extremely limited role. Michigan v. Doran, 439 U.S. at 287-289. Deference must be accorded the executive officers of both the demanding and asylum states. Primary reliance must be placed in them, along with the prosecuting authorities, for the bona fides of a criminal charge.

Here, for example, the California Governor took an inordinate amount of time (two months) after receiving the extradition demand before deciding to issue rendition warrants. The additional extraordinary procedure of notifying real parties nearly three weeks in advance that he intended to issue the warrants provided ample opportunity for them to appear in Louisiana voluntary to begin resolution

of the custody and criminal matters. Nevertheless, consistent with past conduct, they have resisted doing legal battle on any but their own turf.

In short, it is not necessary to create a limited "fraud exception" to the ban on judicial inquiry into another state's charges. In the rare case where such fraud is attempted, reliance upon the good faith and diligence of the executive officers will usually reveal the problem.

* * * *

CONCLUSION

The California holding amounts to a gross misinterpretation of Michigan v. Doran and cannot stand. Allowing consideration of extrinsic evidence on the question of whether the accused is charged inevitably leads a court into the issue of guilt or innocence - an inquiry strictly reserved for the demanding state. There is nothing in the state court's opinion to indicate its rationale would, or could, be limited to the specific facts of this case. No precedent supports the holding, and it is contrary to the letter and spirit of many pronouncements by this Court regarding the limits of an asylum state court's jurisdiction.

The constitutional protection at issue here belongs to the State of

Louisiana. It is guaranteed the right to obtain custody of persons against whom its officers have duly filed criminal charges. California has no jurisdiction to decide the fugitives' guilt or innocence and thereby deprive Louisiana at this right. The decision of the California Supreme Court violates the most fundamental principles underlying the law of extradition and must therefore be reversed. Further, this Court should resist any expansion of the limits of permissible judicial inquiry which have been so long and consistently established by its previous holdings.

For the foregoing reasons, it is respectfully requested that the decision of the California Supreme Court upholding respondent superior court's order barring real parties' extradition be reversed.

DATED: January 15, 1987

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
of the State of California
STEVE WHITE, Chief Assistant
Attorney General

J. ROBERT JIBSON, Supervising
Deputy Attorney General

JRJ:amr
SA86US0005
January 15, 1987

DECLARATION OF SERVICE BY MAIL

Case Name: People of the State of California v. Superior Court of the State of California, for the County of San Bernardino (Richard Smolin and Gerard Smolin, Real Parties in Interest.)

Court No. 86-381

(Service Pursuant to United States Supreme Court, Rule 28(5)(c)

I declare that I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 "K" Street, Suite 511, P. O. Box 944255, Sacramento, California 94244-2550.

On January 15, 1987, I served that attached BRIEF OF PETITIONER, in said cause, by placing a true copy thereof enclosed in a sealed prepaid, in the United States mail at Sacramento, California, addressed as follows:

Lawrence P. Gill, Clerk
California Supreme Court
360 McAllister Street, Room 4050
San Francisco, California 94102

Declaration of Service by Mail
(continued)

Dennis P. Riordan, Attorney at Law
523 Octavia Street
San Francisco, California 94102

Chuck Nacsin, Esq.
357 W. Second Street, Suite 7
San Bernardino, California 92401

Dennis Kottmeier, District Attorney
San Bernardino County
316 North Mt. View Avenue
San Bernardino, California 92415
Attn: JOSEPH A. BURNS,
Deputy District Attorney

Office of the Clerk
California Court of Appeal
Fourth Appellate District
Division Two
303 W. Third Street, Room 640
San Bernardino, California 92401

Hon. David L. Baker, Clerk
County of San Bernardino
351 N. Arrowhead Avenue, 2nd Floor
San Bernardino, California 92415-0210

I declare under penalty of perjury that all parties required to be served have been served, and the foregoing is true and correct and that this declaration was executed at Sacramento, California, on January 15, 1987.

_____
(Signature)